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IN THE

Supreme Court of the United States

.....TERM, 1941.

314-579

No. 150

WILLIAM D. PELLEY, *Petitioner*,

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

T. EDWARD O'CONNELL,
Attorney for William D. Pelley, Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia entered on April 14, 1941, affirming the judgment of the United States District Court for the District of Columbia. Petition for Rehearing was denied May 6th, 1941. The judgment of the District Court discharged a Writ of Habeas Corpus and remanded petitioner to the custody of the United States Marshal for delivery to an agent of the State of North Carolina.

JUDISDICTION.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended, Title 28 (U. S. C.) Sec. 347 and Rule 38(c) of this Court.

STATEMENT OF FACTS.

Petitioner was arrested in the United States Capitol where he was in response to a subpoena of a Congressional Committee. The warrant of arrest was based on a capias (bench warrant) ISSUED BY A JUDGE who formerly was a county prosecutor and WHO PROSECUTED PETITIONER in Buncombe County, North Carolina, IN THIS IDENTICAL CASE. Refusing to waive extradition petitioner was ordered surrendered by the Chief Justice of the District Court, sitting as a Governor. Petitioner immediately filed a Petition for Writ of Habeas Corpus and the Writ issued. After Habeas Corpus hearing the District Court dismissed the petition and discharged the Writ. On appeal the action of the lower Court was affirmed. The record discloses the following facts:

Petitioner, having been convicted on two counts of a sixteen count indictment, in Buncombe County, North Carolina, was given the following sentence on the 17th day of February, 1935:

On the first count: One to two years at hard labor, this sentence to be suspended provided petitioner paid a fine of One Thousand Dollars ($1000.00) plus costs of Court Seven Hundred Sixteen Dollars ($716.00) and remain of good behaviour for Five (5) years and refrain from printing or publishing any pamphlets relating to a stock transaction in the State of North Carolina.

Petitioner having been given his choice of one alternative or the other ELECTED to suffer the monetary penalty and paid into the coffers of the Court the sum of Seventeen Hundred and Sixteen ($1716.00) Dollars. On the second count "prayer for judgment" was continued for five years, mean-

ing that imposition of sentence was suspended for that time.

Petitioner was then released without any requirement that he remain in North Carolina and without any requirement that he report to any agency of the State or of the Court.

The trial judge in the case was the Honorable Wilson Warlick who is still on that bench.

The prosecutor was one Zeb V. Nettles who, since that time, has become a judge in North Carolina. This gentleman was BY LAW assigned to another Judicial District of North Carolina for the October Term of 1939 but had himself transferred with the permission of the Governor of North Carolina (R. 15) from the court to which he was lawfully assigned to the Court in Buncombe County. Immediately after switching courts this former prosecutor, now a judge, issued an order for the arrest of petitioner, of his own volition (R. 229), without any complaint or request from the County Prosecutor (R. 225), and without even conferring with the County Prosecutor (R. 229). When questioned in this proceeding as to the reason for ordering petitioner's arrest he answered (R. 232):

> "that rests in the bosom of the Court, brother; and you and no other power that I know of can make me divulge that information unless I wanted to, * * *."

The Extradition papers contain a copy of an order (R. 19) signed by this former prosecutor, now judge, that petitioner "be brought before the Court for the purpose of imposing sentence" and also extending the five year period of suspended imposition of sentence for an additional five years. Counsel for respondent admits (R. 137 and 156) that the order extending the five year period was a nullity and that they are relying on the capias (bench warrant) as extending the running of the five year period. Section 4665 of the Code of Criminal Procedure of North Carolina expressly limits the period of suspension of sentence to five

years. The opinion of the lower Court holds that the capricious issuance of the bench warrant (capias) at the sole instance of petitioner's former prosecutor, now judge, stayed the running of the five year period, thus doing by indirection what the judge could not do by direct order. Nowhere in its opinion does the lower Court so much as mention petitioner's contention that the illegally issued capias could not be used as a subterfuge and evasion of the letter of the law.

In its written opinion the lower Court states that the action of the judge, in acting in a case which he had prosecuted as county solicitor, and at whose sole instance these proceedings began, was "reprehensible, if true." The qualification "if true" is not justified by anything in the record for it is **UNDISPUTED, UNDENIED** and **CONCEDED** by the respondent. Yet extradition of petitioner has been ordered on the sole basis of this "reprehensible" act.

The lower Court held that the question of jurisdiction, which is the prime question in Habeas Corpus, must be raised in North Carolina and that the mere fact that petitioner has already been tried upon the indictment submitted in no wise lessens the efficacy of that indictment for extradition purposes. The fundamental rule of law that no man may be twice sentenced under the same indictment, (**Ex** parte Lange, 18 Wall. 163) and petitioner's contention that, since he could not again be sentenced, he could not be a fugitive, were rejected by the lower Court as were the leading cases on the subject in decisions of the Supreme Court of North Carolina.

The lower Court filed written Findings of Fact (R. 208-9) that; petitioner had complied with the judgment imposed upon him; that he had never since been charged with a violation of the law of any state or of the United States; that the issuance of the capias (bench warrant) was not based upon any affidavit whatsoever. It was stipulated that petitioner was not on probation or parole and that he was free to travel where he pleased.

Despite the foregoing, the lower Court held; that the issuance of a capias by the prosecutor of this case, now a judge, of his own caprice (R. 229), without any charge of misbehavior (R. 209), without any affidavit of any kind (R. 209), without any request from the prosecuting authorities and without even conferring with those authorities (R. 229), constituted petitioner a FUGITIVE from JUSTICE under a SUBSTANTIAL CHARGE of CRIME and that all questions as to lack of due process, violation of Civil Liberties, double jeopardy, jurisdiction and the "reprehensible" (Court's language) conduct of the judge interfering in a case which he had prosecuted, could only be raised by petitioner's traveling back to present them to the Buncombe County Court, which acted in the atrocious manner above described.

The lower Court based its opinion upon an article in the North Carolina Law Review on "Probation and Suspension of Sentence" and several cases which have no application whatever to the circumstances of this case. The lower Court gave no effect whatever to applicable decisions of this Honorable Court or of the Supreme Court of North Carolina (post) everyone of which is in direct conflict with the opinion of the lower Court.

Within the time prescribed by rule, petitioner filed a Motion for Rehearing. This was denied May 6, 1941.

QUESTIONS INVOLVED.

I. WHETHER THE LOWER COURT ERRED IN HOLDING THAT PETITIONER IS SUBJECT TO EXTRADITION DESPITE THE FACT THAT NO CHARGE OF ANY KIND WHATSOEVER HAS BEEN FILED AGAINST HIM.

The District Court found as a fact (R. 208-9) that petitioner had complied in full with the judgment of the North Carolina Court, had never been charged with any violation of law since that time and that *no charge* of *any nature*

had been made against him. The Findings of Fact referred to read in part as follows:

> "9. Since the conviction mentioned in these Findings petitioner has not been charged in the court in which said conviction was had, nor in any other Court, Federal or state, in the State of North Carolina, with the violation of any law of that state or of the United States."
>
> "10. The issuance of said capias was not based upon any affidavit filed in the cause in which said capias was issued, nor upon any affidavit submitted to the judge who issued said capias."

II. WHETHER THE LOWER COURT ERRED IN REFUSING TO DECIDE IN PETITIONER'S FAVOR THAT AN ORDER FOR HIS ARREST, ISSUED AT THE WHIM AND CAPRICE OF A JUDGE, WHO HAD BEEN COUNTY SOLICITOR AND WHO PROSECUTED THIS IDENTICAL CASE, IS INSUFFICIENT TO WARRANT EXTRADITION, ESPECIALLY WHERE THE ORDER FOR ARREST ORIGINATED IN THE MIND OF THE FORMER PROSECUTOR (NOW JUDGE) R. 229, WITHOUT ANY REQUEST FROM ANY INDIVIDUAL OR AGENCY, R. 225, AND WITHOUT ANY AFFIDAVIT OF MISBEHAVIOR (FINDINGS OF FACT) R. 209.

This is the first case in American legal history in which a man has been held to be a fugitive on the basis of the illegal and reprehensible action of his former prosecutor (now a judge) having himself transferred (R. 15) from the court to which he was lawfully assigned into another court, where in disregard of all principles of legal ethics, four and a half years after that case had been closed by the passing of judgment, reopened that case by issuing an order for the arrest of the man whom he had previously prosecuted, despite the fact that no individual or agency had requested petitioner's arrest and petitioner had been guilty of no misbehavior (Findings of Fact, R. 209) since complying with the judgment of the court.

The lower Court stated in its written opinion that the action of petitioner's former prosecutor was "reprehensible, if true". Its truth is *undisputed* and *undenied* throughout the record yet that "reprehensible" act is the sole basis, according to the Court's opinion, for its Finding that petitioner is a fugitive from justice under a substantial charge of crime.

III. WHETHER THE LOWER COURT ERRED IN HOLDING THAT A GOVERNOR'S WARRANT IN EXTRADITION IS OF SUCH A HIGH DEGREE OF SANCTITY THAT PETITIONER COULD NOT GO OUTSIDE THE RECORD FOR THE PURPOSE OF SHOWING THAT HIS ARREST WAS ORDERED IN VIOLATION OF THE LAW OF NORTH CAROLINA AND IN DISREGARD OF DECISIONS OF THIS COURT AND OF THE SUPREME COURT OF NORTH CAROLINA.

The lower Court failed to give effect to the applicable decision of this Court in the case of *Johnson* v. *Zerbst,* 304 U. S. 458, which holds that it is the duty of the court in a proper case on Habeas Corpus, if necessary, to go outside the record to the end that substantial justice may be done.

It is a violation of the due process clauses of the fifth and fourteenth amendments to the Constitution of the United States and a monstrous infringement of appellant's civil liberties for his prosecutor, who afterwards becomes judge, to issue a capias, of his own volition, for the arrest of one previously prosecuted by him, without any showing of breach of condition of suspended sentence and the Trial Judge below, on Habeas Corpus, abused his discretion by discharging the writ in such circumstances.

IV. WHETHER THE LOWER COURT ERRED IN HOLDING THAT THE COUNTY COURT OF NORTH CAROLINA HAS JURISDICTION TO PRONOUNCE JUDGMENT TWICE ON THE SAME INDICTMENT AFTER COMPLETE COMPLIANCE BY PETITIONER WITH THE FIRST JUDGMENT IMPOSED, THUS FAILING TO GIVE EFFECT TO APPLICABLE DECISIONS OF THIS COURT AND OF THE SUPREME COURT OF THE DEMANDING STATE WHICH HOLD THAT NO ONE MAY BE TWICE PUNISHED UNDER THE SAME INDICTMENT.

The District Court found as a fact (R. 208), that petitioner had complied in full with the penalty imposed in 193 but held petitioner to be a fugitive because his former prosecutor, now a judge, had capriciously ordered petitioner' arrest.

V. WHETHER THE LOWER COURT ERRED IN HOLDING PETITIONER TO BE A FUGITIVE BECAUSE, AS THE OPINION STATED, HIS ARREST WAS ORDERED IN ACCORDANCE WITH A PRACTICE INDULGED BY NORTH CAROLINA JUDGES TO ACT ON THEIR OWN INITIATIVE.

It will be noticed that the opinion of the lower Court i discussing this practice states that bench warrants ma issue "if the *terms* of *probation are violated*" and th opinion ignores the Findings of Fact of the District Cou that there was *not even* a *CHARGE* of a *violation* mad against petitioner and that petitioner was not on probation.

VI. WHETHER THE COURT BELOW ERRED IN HOLDING THAT PETITIONER IS STILL SUBJECT TO THE JURISDICTION OF THE NORTH CAROLINA COURT AFTER THE FIVE YEAR PERIOD OF SUSPENDED IMPOSITION OF SENTENCE HAS EXPIRED, AS PETITIONER'S FORMER PROSECUTOR (NOW JUDGE) HAS EVADED A PROVISION IN NORTH CAROLINA LAW, STRICTLY FORBIDDING THE EXTENSION OF A SUSPENDED SENTENCE FOR LONGER THAN FIVE YEARS, BY THE SIMPLE EXPEDIENT OF ISSUING AN ORDER FOR PETITIONER'S ARREST, WITHOUT ANY AFFIDAVIT, REQUEST OR OTHER REASON FOR DOING SO.

Section 4665 of the Code of Criminal Procedure of the State of North Carolina, relating to termination of probation, reads as follows:

> "The period of probation or suspension of sentence *shall not exceed a period of five years* and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the Court at any time *within the above limit.*"

Although it is apparent that no judge has the power, by direct order, to extend the five year period the lower Court held that the issuance of a capias for petitioner's arrest, without any reason whatsoever being offered to justify its issuance, automatically circumvented the above cited strict provision of North Carolina Law relating to period of suspension of sentence.

REASONS FOR GRANTING THE WRIT.

I.

THE LOWER COURT ERRED IN HOLDING THAT PETITIONER IS SUBJECT TO EXTRADITION ALTHOUGH NO CHARGE OF ANY KIND HAS BEEN FILED AGAINST HIM.

Not one word in the opinion explains how the lower Court arrived at the conclusion that petitioner is (1) a Fugitive and (2) under a Substantial Charge of Crime. The trial court made, among others, the following Findings of Fact:

> "3—Petitioner paid the fine of $1,000 imposed as a condition of the suspension of said sentence and also the costs, payment of which was also required as a condition of said suspension."
>
> "9—Since the conviction mentioned in these Findings petitioner has not been charged in the court in which said conviction was had, nor in any other court, Federal or state, in the state of North Carolina, with the violation of any law of that state or of the United States."
>
> "10—The issuance of said capias was not based upon any affidavit filed in the cause in which said capias was issued, nor upon any affidavit submitted to the judge who issued said capias."

In view of such Findings of Fact,—*full compliance* with the *judgment imposed* and *no charge* of any offense since that time what makes petitioner a fugitive? The Court below refers throughout the opinion to "the right of a court to cause the arrest of a defendant for violating any of the conditions of probation or suspension of sentence". Of course all courts have that right. Petitioner has never urged the contrary. But petitioner does urge that some *charge must be filed* against him to justify his removal to another state. And as shown by the Findings of Fact petitioner's arrest was not ordered because of any violation. His arrest was just ordered! The judge who ordered petitioner's arrest, and who is the same person who prosecuted this case,

was interrogated in the presence of counsel for the respondent. When questioned as to what information formed the basis for his ordering petitioner's arrest he answered (R. 232),

> "that rests in the bosom of the Court, brother; and you and no other power that I know of can make me divulge that information, unless I wanted to, but I have no disposition to hide anything that I know of in the matter."

The Court below discusses, throughout its opinion, cases in which the alleged fugitive, during a Habeas Corpus hearing on extradition attempted to go into the question of his guilt or innocence of the *charge preferred against him*, either of violating the law or violating a condition of probation or suspension of sentence.

Not one case is cited, and not one case in American legal history can be found, in which as here, extradition has been ordered *without the filing* of any charge whatsoever.

In its opinion the Court below discusses the indictment which accompanies the extradition papers as though it were a new indictment, upon which petitioner had never been tried, convicted, punished and freed. Nowhere is it mentioned in the opinion that, as shown by the Findings of Fact, (R. 208), petitioner complied in full with the judgment pronounced. The Court below confines itself to a glance at the papers sent from North Carolina, without regard to that fact. Logically, had petitioner been acquitted on all counts, instead of all but two, he must yet return to North Carolina, for the indictment has been sent here and the Court is restricted to a glance at the face of the papers themselves and all other matters must be presented to the court of the demanding state.

Of course it is elemental that no one may be extradited unless he is a fugitive from justice. The sole and solitary reason upon which the lower Court based its conclusion that petitioner is a fugitive from justice (R. 208-9) is the fact that petitioner was absent from the State of North Carolina at the time the order for his arrest was issued. Following

such reasoning a capias issued for any of us, by any judge in the United States, would constitute us fugitives from justice and since the lower Court ruled that it must confine the scope of its scrutiny to the face of the extradition papers alone there would be no alternative other than to travel to the demanding state to show the Court in that state, if possible, its error. Innumerable decisions of this Court and of the courts throughout the United States have held that an affidavit on information and belief, no matter how strongly worded, is insufficient to justify extradition. Yet, in this case extradition has been ordered without any affidavit whatsoever because, following the opinion of the lower Court, the issuance of capias by petitioner's former prosecutor magically and automatically constitutes petitioner a fugitive from justice under a substantial charge of crime.

II.

THE LOWER COURT ERRED IN REFUSING TO DECIDE IN PETITIONER'S FAVOR THAT AN ORDER FOR HIS ARREST, ISSUED AT THE WHIM AND CAPRICE OF A JUDGE, WHO HAD BEEN COUNTY SOLICITOR AND WHO PROSECUTED THIS IDENTICAL CASE, IS INSUFFICIENT TO WARRANT EXTRADITION, ESPECIALLY WHERE THE ORDER FOR ARREST ORIGINATED IN THE MIND OF THE FORMER PROSECUTOR (NOW JUDGE) (R. 229), WITHOUT ANY REQUEST FROM ANY INDIVIDUAL OR AGENCY (R. 225), AND WITHOUT ANY AFFIDAVIT OF MISBEHAVIOR (FINDINGS OF FACT) (R. 209).

> *"The wise determine from the gravity of the case; the irritable from sensibility to oppression; the high-minded, from disdain and indignation at abusive power in unworthy hands."—Burke.*

This is the first case in American legal history in which a man has been held to be a fugitive on the basis of the illegal and reprehensible action of his former prosecutor (now a judge) having himself transferred (R. 15) from the court to

which he was lawfully assigned into another court, where in disregard of all principles of legal ethics, four and a half years after that case had been closed by the passing of judgment, reopened that case by issuing an order for the arrest of the man whom he had previously prosecuted, despite the fact that no individual or agency had requested petitioner's arrest and petitioner had been guilty of no misbehavior (Findings of Fact R. 209) since complying with the judgment of the court.

Capias for petitioner's arrest, which is the sole basis for these extradition proceedings, was issued by a judge who is the same man who prosecuted petitioner. All rules of law and ethics barred this former prosecutor, now a judge, from injecting himself into a case which he had formerly prosecuted. This judge was *by law* assigned to a judicial circuit other than that embracing Buncombe County, but through some manner of political skulduggery, filled with lust and hatred for petitioner, he procured (R. 15) the approval of the Governor of North Carolina to his transfer from the judicial circuit to which he had been lawfully assigned to the one embracing Buncombe County. On October 19, 1939, three days after having himself switched into that Court, he had extracted from the musty files of that Courthouse the file in petitioner's case, which had lain undisturbed for four years and nine months and, without any justification in law or fact, arbitrarily and capriciously issued an order for the arrest of petitioner, the man whom he had prosecuted in that identical case. Despite the intensive search on the part of counsel for the respondent, he has been unable to cite one case, of all the millions in the law books, depicting a set of circumstances comparable with the malignant facts of record in this case.

Ignoring the fact that all of the foregoing is undisputed and undenied throughout the record the lower Court held that the issuance of capias, under the atrocious circumstances just described, constituted petitioner a Fugitive from Justice under a Substantial Charge of Crime, failing to give application to the decision of this court in case of

In Re Bonner, 151 U. S. 242, 14 Sup. Ct. Rep. 323, 38 L. E. 149, holding as follows:

> "The writ of habeas corpus is a protection of the citizen from encroachment upon his liberty from any source . . . equally from the unauthorized acts of courts and judges as those of individuals."
>
> "A judgment, though pronounced by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judges, but upon the settled and invariable principles of justice."
>
> Baker v. State, 3 Ark. (3 Pike) 491.
> Citing State v. Harborne, 45 Atl. 432, 27 Conn. 607.

It will be noticed that these proceedings are not directed to the end that petitioner be given a hearing in North Carolina, for he has already been condemned to be sentenced, as clearly shown by the order signed by the judicial tyrant, who acted as hereinbefore described. That order (Page 19 of the Record) reads in part as follows:

> "The undersigned judge issued a capias for the arrest of the said W. D. Pelley, to be brought before the court *for the purpose of imposing sentence upon the said W. D. Pelley within the said period of five years.*"

There can be no denying that petitioner, by the terms of that order, has been condemned without a hearing.

Speaking of such an abuse of judicial power by a judge, the late Justice Cardozo of this Court, in an opinion written by himself, said:

> "When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to Habeas Corpus to put an end to the restraint. It is beside the point to argue, as the government does, that in this case a hearing, if given, is likely to be futile because the judge has made it plain how his discretion will be exercised in that already he has cancelled the suspension on the strength of an *ex parte* showing. The *non sequitur* is obvious. The judge is without the light

whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender. Cf. Snyder v. Mass., 291 U. S. 97, 116, 78 L. E. 694. *Judgment ceases to be judicial if there is condemnation in advance of trial.*" Escoe v. Zerbst, 295 U. S. 490 (decided 1935) 79 L. E. 1566.

"Due process implies a tribunal both impartial and mentally competent to afford a hearing." Jordan v. Mass., 225 U. S. 167, 176 (1912) 56 L. E. 1038.

"The law of the land, in the words of Daniel Webster, is a law which hears before it condemns."
Powell v. Ala., 287 U. S. 45, 68 (1932).

"The essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice."
Jacob v. Robts., 223 U. S. 261, 265 (1912).

"That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but statement."
Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. 189, 193 (1915).

"Even before the 14th Amendment was adopted the Supreme Court had stated that it was a 'great fundamental rule in the administration of justice . . . that every one shall have an opportunity of defending his rights before judgment is pronounced against him."
Smith v. McCann, 24 How. 398, 407 (1861).

The lower Court in its opinion omits all mention of cases cited to it wherein the Supreme Court of the State of North Carolina, in clear and unambiguous language, indicated that no court in that state has jurisdiction to punish a man, in whose favor imposition of sentence has been suspended, unless there first be filed against that man a charge of a violation of the criminal law of North Carolina.

"Where a judgment in a criminal case has been suspended on condition of payment of costs and good behavior, the term 'good behavior', by correct interpretation, means such conduct as is authorized by the law of

the state. In other words a violation of some criminal law of the state must be made to appear before a defendant can be held to have violated the terms of such suspended judgment. In order to be a valid sentence on such suspended judgment, it must be properly established by pertinent testimony that the conditions have been broken within the meaning and purpose of the above principle."

State v. Hardin, 112 S. E. 593.

The lower Court in its opinion also failed to apply the decision of the Supreme Court of North Carolina, written by Mr. Chief Justice Stacy, in the leading case on the subject:

"In the next place, if the case were not off the docket in the March Term, 1927, it may be doubted as to whether the finding that 'the condition upon which the prayer was continued has been violated', without knowledge, is sufficient to warrant the imposition of a road sentence. In S. V. Hardin, 183, N. C. 815, it was said that where judgment in a criminal prosecution has been suspended on condition that the defendant pay costs and remain of good behavior, the term 'good behavior', by correct interpretation, means such conduct as is authorized by the law of the State. *In other words, the violation of some criminal law of the State must be made to appear before a defendant can be held to have violated the terms of such suspended judgment.*" (Italics ours)

State v. Gooding, 194 N. C. 271, 134 S. E. 436 (1927).

"On the trial of that case the evidence did not authorize a conviction, and the recorder discharged the defendant; but apparently he was of the opinion that the evidence showed that the defendant's behavior was not good, and he accordingly directed the marshal to enforce the sentence in the former case. In other words the court seems to have *convicted him of bad behavior, which was not an offense with which he was charged, or for which he was or could have been tried.*"

Gordon v. Johnson, 126 Georgia Rep. 584 (1906) (Ga. Sup. Ct.) Habeas Corpus.

One of the prime purposes of the writ of Habeas Corpus is to protect the individual against arrogant attempts to pervert the power of the judiciary to the satisfying of a judge's personal animosity for another man.

The Rule to be laid down in this case far overshadows in importance the predicament of petitioner. THE RULE IN PELLEY'S CASE WILL BE APPLIED TO EVERY UNFORTUNATE INDIVIDUAL WHO HAS HAPPENED TO INCUR THE PERSONAL ANIMOSITY OF A JUDGE. If this Honorable Court holds that the abuse of judicial power capriciously and unlawfully exercised by petitioner's former prosecutor, now a judge, in ordering appellant's arrest, without any reason for so doing, (R. 225, 228, 229), but only to satisfy his own caprice, requires that petitioner be dragged back before that tyrant, then God help every person in the United States who has ever been tried and convicted on an indictment. According to the lower Court, the courts of the asylum state may not consider proof that the alleged fugitive has complied with the judgment in full or has been acquitted, as the court must confine its scrutiny to the extradition papers alone, identity being admitted. This court cannot lay down a rule, to be followed by the courts throughout the United States, upholding such an unconscionable and preposterous contention. Jurisdiction in the court of the demanding state is an essential element for an extradition demand. *Nowhere* in the *Record* nor in the opinion of the lower Court does there appear *anything* which justifies the court's Finding that "petitioner is substantially charged with crime and a fugitive. There is in the Record only a second-hand indictment upon which petitioner has already been tried and fourteen counts of which have been dismissed, resurrected from the files of the Buncombe County Courthouse for the sole purpose of gratifying the malice of a judge so lacking in conscience and principle as to violate the time honored rule that no judge shall take any part in a case which he has personally prosecuted.

III.

THE LOWER COURT ERRED IN HOLDING THAT A GOVERNOR'S WARRANT IN EXTRADITION IS OF SUCH A HIGH DEGREE OF SANCTITY THAT PETITIONER COULD NOT GO OUTSIDE THE RECORD FOR THE PURPOSE OF SHOWING THAT HIS ARREST WAS ORDERED IN VIOLATION OF THE LAW OF NORTH CAROLINA AND IN DISREGARD OF DECISIONS OF THIS COURT AND OF THE SUPREME COURT OF NORTH CAROLINA.

> *"How little do they see what really is, who frame their hasty judgment upon that which seems."—Southey.*

This Honorable Court laid down the rule in *Johnson* v. *Zerbst*, 304 U. S. 458, that it is the duty of the District Court on Habeas Corpus hearing to go outside the record, if necessary to the doing of substantial justice. And it is the settled policy of this Court not to permit mere legal technicalities to obstruct the road to substantial justice.

Fugitivity is, of course, a question of fact, and not of law. That is fundamental. Yet the lower Court excluded all evidence offered to show that there was no *lawful demand* for petitioner's return, that he was not a fugitive from justice and that he was not charged with crime. The lower Court ruled that the scope of its inquiry was restricted to the papers alone, identity being admitted, and since the papers appeared to be in "due form", because of the certification of the Governor of North Carolina the Court was precluded from inquiring further and had no alternative than to order petitioner's surrender.

Concerning such contention the following from Scott on Interstate Rendition Page 67 is most timely:

> "Section 49—EXECUTIVE CARELESSNESS.—In many of the States, in nine applications out of ten, the executive delegates to a clerk in his office the task of examining requisitions and the accompanying papers, full reliance is placed in the judgment of the

clerk, and as a matter of course the requisition is honored and the governor's warrant is issued. The liberty of the citizen is thus jeopardized by an ex parte hearing in the demanding State, and an unauthorized finding in the asylum state. Too little personal attention is given by governors themselves to requisitions."

Judge Pope, a learned United States District Judge, at Chicago, Illinois when offered the contention that the Governor's warrant of arrest was entitled to greater sanctity and respect because it was the rendition process of the Chief Executive of a State, in the celebrated case *Ex parte Smith*, (1842) 3 McLean, 121, destroyed this contention with the following succinct description of the powers and munificence of the Writ of Habeas Corpus.

"The Court cannot assent to this distinction. This is a government of law, which prescribes a rule of action as obligatory upon the governor as upon the most obscure officer. The character and purpose of the habeas corpus are greatly misunderstood by those who suppose that it does not review the acts of an executive functionary. All who are familiar with English History, must know that it was extorted from an arbitrary monarch, and that it was hailed as second Magna Charter, and that it was to protect the subject from arbitrary imprisonment by the king and his minions which brought into existence that great palladium of liberty in the latter part of the reign of Charles II. It was indeed a magnificent achievement over arbitrary power. Magna Charta established the principles of liberty; the habeas corpus protected them. It matters not how great or obscure the prisoner, how great or obscure the prison-keeper, this munificent writ, wielded by an independent judge, reaches all. It penetrates alike the royal towers and the local prisons, from the garret to the secret recesses of the dungeon. All doors fly open at its command, and the shackles fall from the limbs of prisoners of state as readily as from those committed by subordinate officers. The warrant of the King and his Secretary of State could claim no more exemption from that searching inquiry, 'the cause of his caption and detention,' than a warrant granted by a justice of the peace."

The lower Court took no cognizance of this Honorable Court's decision in the case of Johnson against Zerbst, decided in 1938, in which this Court said:

> "Congress has expanded the rights of a petitioner for *habeas corpus* and the". . . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the Act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'
>
> "There being no doubt of the authority of the Congress to thus liberalize the common law procedure on an *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. . . .
>
> ". . . it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, . . ."
>
> *Johnson* v. *Zerbst*, 304 U. S. 466.
>
> "In every extradition case the question of the good faith of the prosecution is always open to inquiry on Habeas Corpus." 245 P. 68.

Petitioner offered evidence to show that his extradition was not sought in good faith and to show that the act of his

former prosecutor in ordering his return, without any affidavit or other legal foundation, is "functus officio" and in violation of his civil liberties and constitutional rights. He also sought to show that the essential requirement in extradition, jurisdiction, was lacking because of his compliance in full with the judgment imposed upon him and his contention that he owes no obligation to that court under the decision of this Court and the laws and court decisions of North Carolina. All offers of such proof were summarily rejected and the court proceeded to decide the case on the fact that, as the Court said, the papers appeared to be in "due form". In an opinion delivered February 10, 1941, this Honorable Court said:

> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and and shown his right to a discharge."
>
> *Walker* v. *Johnson,* U. S. Sup. Ct. Feb. 10/41.

Following the opinion of the lower Court, petitioner's prosecutor might demand his arrest thirty years from now and petitioner would be precluded from saying that he was no longer subject to the jurisdiction of the North Carolina Court, even though he had complied with the judgment imposed upon him.

Certainly the lower Court erred in ruling that it was without power to go behind the requisition of the Governor, that all such matters were within the Governor's discretion (R. 73) and that the Court was confined to an inspection of the extradition papers (R. 74). Certainly, in such irregular and suspicious circumstances surrounding the issuance of the capias, the question of good faith was intimately bound up with the question of whether or not extradition was sought for a bona fide purpose. The lower Court was not bound to perform an idle act and order the extradition of petitioner merely to satisfy the lust and hatred of petitioner's former prosecutor.

> "When a prisoner is held under a judgment of a court made without authority of law, the proper tribunal will upon Habeas Corpus, look into the record so far as to ascertain this fact, and, if it be found to be so, will discharge the prisoner. It is no answer to say the court had jurisdiction of the person of the prisoner, and of the offense, under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such a case."
>
> *People ex rel Tweed* v. *Liscomb,* 60 N. Y. 559, 572, 19 Am. Rep. 211.

Hence it is clear that there were no legally recognized facts to support the capias issued by the judge in North Carolina and inasmuch as the Governor's requisition was based solely on the illegally issued capias the action of the Governor is a nullity.

IV.

THE LOWER COURT ERRED IN HOLDING THAT ONE WHO HAS BEEN SENTENCED UNDER A VALID INDICTMENT TO EITHER PAY A FINE OR GO TO THE PENITENTIARY, HAVING ELECTED TO SUFFER THE MONETARY PENALTY, MAY, FIVE YEARS LATER, BE SENTENCED ON ANOTHER COUNT IN THAT INDICTMENT THUS FAILING TO GIVE EFFECT TO APPLICABLE DECISIONS OF THIS COURT AND OF THE SUPREME COURT OF THE DEMANDING STATE WHICH HELD THAT NO ONE MAY BE TWICE PUNISHED UNDER THE SAME INDICTMENT.

It is conceded between the parties hereto that petitioner paid a fine on the first count of One Thousand ($1000.00) dollars plus costs of court amounting to Seven Hundred and Sixteen ($716.00) dollars. Petitioner was given the *alternative* to either pay into the coffers of the Court the sum mentioned or, in lieu thereof, to serve a term of from one to two years at hard labor. Petitioner *ELECTED* to

suffer the monetary penalty. According to the opinion of the lower Court had petitioner elected to suffer the one to two years at hard labor he could still be sentenced to an additional punishment upon the same indictment. As absurd and ludicrous as that proposition sounds it is the only conclusion allowed by the opinion of the lower Court that petitioner is still subject to further punishment in North Carolina on an indictment by reason of which he has already suffered one penalty.

It is quite obvious that unless petitioner is subject to some further punishment in North Carolina it is impossible for him to be a fugitive from the justice of that state.

The Findings of Fact (R. 208-9) conclusively show that petitioner has had *one* judgment pronounced upon him and that he has *complied in full* with that judgment. Consequently, he is not subject to further punishment by way of a second judgment and therefore is not a fugitive. The lower Court failed to apply the decision of the Supreme Court of North Carolina in the leading case of *State* v. *Crook*, 115 N. C. 760, 20 S. E. 513, which states the law as follows:

> "It is familiar learning that a court may suspend the judgment of a criminal *in toto* until another term, but has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count after a subsequent term, or by imposing a fine and at a later term superadding an imprisonment."
>
> Citing State v. Ray, 50 Iowa 520; State v. Miller, 6 Baxter, Tenn. 513; State v. Watson, 8 S. W. 383, 95 Missouri 411; People v. Felix, 45 Cow. 163; Thurman v. State, 54 Ark. 120; Wharton's Criminal Pleadings and Practice, Sec. 913; Whitney v. State, 6 Tenn. 247.

This Honorable Court has already spoken on the subject in a most extensive discussion of the very point involved here—the right to pronounce judgment a second

time after full compliance with the first judgment imposed in the form of an alternative sentence. The following are pertinent excerpts from the opinion of this Court in the leading case on the subject of a court's right to punish twice (*Ex Parte Lange*, 18 Wall. 163).

> Head Note: "The judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end."
>
> "A SECOND JUDGMENT ON THE SAME *VERDICT* IS, UNDER SUCH CIRCUMSTANCES, VOID FOR WANT OF POWER, AND IT AFFORDS NO AUTHORITY TO HOLD THE PARTY A PRISONER, AND HE MUST BE DISCHARGED."
>
> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense." (Ibid.)
>
> "Of course, if there had been no punishment the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle, that no person shall be twice punished for the same offense, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial." (Ibid.)
>
> "It is very clearly the spirit of the instrument to prevent a second punishment of judicial proceedings for the same crime, so far as the common law gave that protection."

"In the case of The Commonwealth v. Olds, one of the best common law judges that ever sat on the bench of the Court of Appeals of Kentucky remarked, 'that every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. . . . To prevent this mischief the ancient common law, as well as Magna Charta itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of autrefois acquit and autrefois convict. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question.' " (Ibid.)

"The petitioner, then, having paid into court the fine imposed upon him of two hundred dollars, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of any one else but the Congress of the United States, and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing." (Ibid.)

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." (Ibid.)

Respondent lays great stress upon the fact that as to the second count upon which petitioner had been convicted there was a "continued prayer for judgment". Petitioner concedes that had there been no judgment rendered against

him the continued prayer for judgment might still be of effect, but having been punished on one count of the indictment and not being subject to further punishment under that same indictment petitioner is no longer a fugitive from the justice of North Carolina.

To say, as the lower Court has, that petitioner may be sentenced on another count after paying the full penalty of an alternative sentence on the first count is to say that had petitioner been convicted on forty counts he could be sentenced at forty separate times. Preposterous as that sounds, it is the rule of law laid down in the opinion of the lower Court.

> "The district court, after judgment rendered in first count of information, has no power to render a second judgment at a later term against the accused under the second count of the indictment *notwithstanding that a continuance was had to a later date with a view of considering action to be taken on second count.*" Gillespie v. Walker, 296 F. 330 (W. Va. 1924).
>
> "There can be only one judgment upon the indictment; and this must be strictly and exclusively upon the particular count or counts upon which the defendant has been found guilty. It is a necessary consequence from this principle, that a judgment rendered and sentence awarded in pursuance thereof, definitively and conclusively disposes of the whole incidently." Edgerton v. Commonwealth, 5 Allen 514 (1862); Commonwealth v. Bennett, 2 Va. Cas. 235; Commonwealth v. Foster, 122 Mass. Rep. (1877) 317.
>
> "That there could be only one judgment upon the indictment, and that consequently a judgment and sentence upon one count definitively and conclusively disposed of the whole indictment and operated as an acquittal upon, or discontinuance of the other count. And the same view has been affirmed by decisions in other states." Guenther v. People, 24 N. Y. 100; Girtz v. Commonwealth, 22 Penn. St. 351; Weinzorpflin v. State, 7 Black 186; Stoltz v. People, 4 Scam. 168; State v. Hill, 30 Wis. 416; Kirk v. Commonwealth, 9 Leigh 627; Nabors v. State, 6 Ala. 700; Morris v. State, 8 Sm. and Marsh 762.

It will be noticed that respondent will be unable to offer one case upholding the opinion of the lower Court that petitioner is still subject to further punishment in North Carolina. There has never been another case in American history in which extradition was attempted after full compliance with an alternative sentence. (Such full compliance has been found as a matter of fact in this case (R. 208). And it will also be noticed that *every case* cited by respondent as justifying the opinion of the lower Court, *contains* a *charge* of some kind of violation—either of the law or of probation, while here we have extradition sought *without* the *filing of any charge whatsoever* (R. 209).

> "While a writ of habeas corpus cannot be used as a writ of error, it may be employed to obtain a discharge from imprisonment, where the court is either without jurisdiction, or *without power to pronounce* sentence, as *where petitioner has been* once *tried for the same offense with which* he is *charged.*" Bens v. U. S. (C. C. A. N. Y. 1920) 266 F. 152, certiorari denied (1920) 41 S. Ct. 8, 254 U. S. 634, 65 L. Ed. 449.

From the foregoing it is obvious that the North Carolina Court has no power to impose a second sentence upon petitioner, after petitioner's compliance in full with the first judgment imposed upon him, for a court, without the power to pronounce sentence, is a court without jurisdiction. Lacking jurisdiction over the petitioner that Court's demand for his return is of no legal consequence whatsoever.

V.

THE LOWER COURT ERRED IN HOLDING PETITIONER TO BE A FUGITIVE BECAUSE, AS THE OPINION STATED, HIS ARREST WAS ORDERED IN ACCORDANCE WITH A PRACTICE INDULGED BY NORTH CAROLINA JUDGES TO ACT ON THEIR OWN INITIATIVE.

A glance at the written opinion shows that each and every authority cited by the Court to justify its opinion is absolutely inapplicable to this case for each and all are concerned with some *charge* of a *violation* either of the law or of some condition of suspension of sentence or parole. In the present case there is *no charge of any kind.* (Findings of Fact R. 209.)

In its opinion the Court concludes that petitioner becomes a fugitive by the issuance of a capias for his arrest by petitioner's former prosecutor, now a judge. The opinion discusses at length the probation system of North Carolina which provides for the arrest of one under suspended sentence WHO VIOLATES THE CONDITIONS OF SUSPENSION OF SENTENCE. This is not a case in which petitioner asks a court to inquire to determine whether there has been a violation by him of the terms of suspension of sentence. Petitioner asks this Court to notice that there has NOT even been a CHARGE of violation of any terms of suspension of sentence. The lower court found as a fact that there had been *no charge* of a violation (R. 209-10). How then can petitioner be a fugitive?

This Court in its opinion discusses the Common Law system and the 1937 North Carolina Statute authorizing an arrest *for violation of the terms of a suspended sentence* but nowhere in the opinion does this Court mention that the lower Court found as a fact (R. 209-10) that there had *never been* a *charge against* petitioner since the time of suspension of sentence on the second count. In view of such finding of fact, which is binding upon this Court, what justification is there for saying that petitioner is substantially charged with crime and a fugitive from justice?

The lower Court justifies its opinion by referring to an article in the North Carolina Law Review and to the fact that "For nearly half a century prior to 1937, the trial judges in North Carolina operated a system of probation on their own initiative . . .," but it will be observed that *even in the antiquated practice of the judges* mentioned in the opinion, there never was a case, as here, in which any judge or court ordered the arrest of a man *without even a charge that he had violated either the law or his probation* and nowhere in the opinion is it mentioned that the trial court found as a fact (R. 209) that no charge of such violation had ever been filed against petitioner.

It is obvious that the North Carolina case was closed when petitioner paid his fine and went forth a free man, his bond having been released, with no requirement that he ever again report to the Court. The Honorable Wilson Warlick, who conducted petitioner's trial, is still on the Bench in Buncombe County, North Carolina, and he has never indicated any desire to either have petitioner arrested or punished since petitioner was released by him after payment of a fine. As shown by the Record (R. 229), petitioner's prosecutor (now judge) never conferred with Judge Warlick, the trial judge, before the former prosecutor issued his order for the arrest of petitioner. It is plain that the time for noting an appeal has long since expired and the opinion of the lower Court places its stamp of approval upon a system by which a defendant may be persuaded to waive his right to have his case reviewed by an appellate tribunal. It is hard to believe that such a fraud upon the rights of defendants could be countenanced in the United States but that is the only conclusion to be drawn from the opinion of the lower Court. The Supreme Court of North Carolina does not agree with the opinion of the lower Court for it has stated:

> "This power of the Court to suspend judgment upon terms should not be exercised so as to prejudice or embarrass the defendant's rights to review the judgment and proceedings of the Court upon which it is based, by

appeal, if he elects to do so." (Violation of due process of law.)

State v. *Everett*, 164 N. C. 399.

Every case cited in the opinion of the Court and every case which will be cited to this Honorable Court by respondent in his opposition to this Petition for Certiorari concerns itself with a CHARGE OF A VIOLATION OF A CONDITION OF PAROLE OR PROBATION or an excerpt is taken from a case in which the alleged fugitive has NEVER EVEN BEEN TRIED and seeks to avoid being returned to the demanding state for trial. In all of the cases cited in the opinion and which will be cited by respondent to support the opinion the alleged fugitive attempted to take issue with the charge of a violation of his parole or probation. NO SUCH QUESTION IS INVOLVED IN THIS CASE. No probation officer, no parole board, and not even the judge who issued capias for petitioner's arrest charges a violation either of his suspended sentence or of the law. (Findings of Fact R. 208-9.) There is in this case only the demand of a private individual, misusing and abusing the powers of his office by taking it upon himself, without even conferring with the prosecutor (R. 229), to demand petitioner's arrest. The act of the judge in such circumstances is not a judicial act, for demands for arrest originate not with a judge, but with a prosecutor. No judge has the right to inaugurate a prosecution and no judge has the right to demand a man's arrest and extradition at his own whim and caprice.

The lower Court states in its opinion, "In similar circumstances we have held that a fugitive from justice found in the District of Columbia may be extradited to the demanding state." The "similar circumstances," as shown by the opinion, refer to a defendant arrested for violating some condition of probation or suspension of sentence. No such situation exists here for petitioner is not charged with a violation of any kind. The court assumes that this case is in the category of many other cases in which it has been

held that one who has committed an offense in another state and who is not in that state at the time his presence is demanded there, or, having committed an offense in that state absents himself from that state for any reason, is a fugitive from justice and it is not necessary that he shall have fled from that state. Such assumption does not apply to this case. As shown by the lower Court's opinion the charge against petitioner is contained in an indictment certified by the Governor of North Carolina as being a crime in that state. That is the only crime mentioned in this case. Petitioner has already been tried on that indictment and on the charge which the Governor certifies is a crime. What appears in the requisition papers as a crime is not justification for extradition, for petitioner has already been tried, convicted, judgment imposed and complied with. Consequently the conclusion that petitioner is a fugitive because of a certified charge of crime is without foundation for extradition purposes, for petitioner has already been punished on that identical charge.

VI.

THE COURT BELOW ERRED IN HOLDING THAT PETITIONER IS STILL SUBJECT TO THE JURISDICTION OF THE NORTH CAROLINA COURT AFTER THE FIVE YEAR PERIOD OF SUSPENDED IMPOSITION OF SENTENCE HAS EXPIRED, AS PETITIONER'S FORMER PROSECUTOR (NOW JUDGE) HAS EVADED A PROVISION IN NORTH CAROLINA LAW, STRICTLY FORBIDDING THE EXTENSION OF A SUSPENDED SENTENCE FOR LONGER THAN FIVE YEARS, BY THE SIMPLE EXPEDIENT OF ISSUING AN ORDER FOR PETITIONER'S ARREST, WITHOUT ANY AFFIDAVIT, REQUEST OR OTHER REASON FOR DOING SO.

Section 4665 of the Code of Criminal Procedure of the State of North Carolina, relating to termination of probation, reads as follows:

> "The period of probation or suspension of sentence *shall not exceed a period of five years* and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time *within the above limit.*"

The lower Court found that because "capias for petitioner's arrest was admittedly issued within the period of suspension" then the five year period of suspension has been stayed from running. Certainly under North Carolina Law no judge may (by direct order) for that purpose issue an order extending the period of suspended imposition of sentence. But the Court below held in its opinion that, though the extension beyond five years is clearly forbidden by North Carolina Law, that law may be circumvented and evaded by the simple expedient of issuing a capias for petitioner's arrest without any affidavit, without any request from any agency whatsoever, and without even a charge of a violation of law or of any condition attaching to the suspended imposition of sentence. Ac-

cording to the opinion, the North Carolina law restricting an extension of suspension of sentence beyond five years is a farce and a nullity to be capriciously ignored by ordering petitioner's arrest. THE BUNCOMBE COUNTY JUDGE, PETITIONER'S PROSECUTOR, WHO ISSUED THE CAPIAS, CONCEDED THAT THE CAPIAS HAD NO EFFECT UPON AND DID NOT STAY THE RUNNING OF THE FIVE YEAR PERIOD. He conceded this by his action two days after the five year period had ended, in entering a formal order which attempted to extend the five year suspension for another five years. This order was admitted at the hearing below, by the respondent, to be a nullity (R. 137-156). Respondent on the hearing urged that the capias stayed the running of time of suspension of sentence. The Court below asked (R. 136),

> "Then why did he make the extension of the 19th of February?"

The respondent answered (R. 137),

> "I think that order of February was useless."

Of course it was useless, but it is an unqualified acknowledgment by the judge who signed it that the illegally issued capias did not stay the running of the five year period.

It may thus be seen that the judge (petitioner's prosecutor) who issued the capias for petitioner's arrest realized the absolute lack of legality of the capias and that its issuance did not affect the running of the five year period of suspension of sentence. Obviously, if the capias stayed the running of the five year period, it would not have been necessary for him to attempt the illegal extension of the period of suspension. If the judge had no power, by direct order, to extend the five year period, how can respondent possibly justify its extension by the malodorous subterfuge of issuing a capias for petitioner's arrest without any legal reason being offered for so doing? On the hearing the respondent first attempted to justify the illegal order extending the period of suspension and the judge who conducted

the Habeas Corpus hearing, in commenting on their Argument said (R. 134) "according to your construction it could be continued forever, continuing as long as the man lives."

> "The indefinite suspension of a sentence has been held a condonation of the offense and an exercise of pardoning power beyond the power of a court."
> *U. S.* v. *Wilson,* 46 Fed. 748.

Respondent, in a brief to the lower Court, urged upon that court "even conceding for purposes of argument . . . *that the capias possibly may have been illegally issued* by the Court of North Carolina, they are matters which cannot be properly considered by the courts of this jurisdiction." Thus, we see the absurd proposition that the issuance of the capias stayed the running of the five year period after the capias was issued illegally. One need not be a student of the law to know that an illegally issued capias is of no legal effect and could not have any possible effect upon the running of the five year period. Unless the capias stayed the running of the five year period that period expired on the 17th of February, 1940.

Confronted with the foregoing the District Court, at the termination of the Habeas Corpus hearing, ordered petitioner returned to North Carolina on the ground that he was still subject to the jurisdiction of that Court by reason of the aforementioned illegally issued capias (Finding of Fact No. 7 (R. 209)).

Wherefore, your petitioner respectfully prays, that a Writ of Certiorari may issue out of and under the Seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding the said Court to certify and send to this court, on a day certain to be therein designated, a complete transcript of the Record and proceedings of the said Court of Appeals in the said case therein entitled William D. Pelley, appellant, vs. John B. Colpoys, United States Marshal in and for the District of Columbia, appellee, #7734, to the end that the said case may be reviewed and determined by this Court as provided

in Judicial Code Sec. 240 (a), or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the said Court of Appeals in the said case, and every part thereof, may be reviewed by this Honorable Court.

And your petitioner will ever pray.

T. Edward O'Connell,
Attorney for William D. Pelley,
Petitioner.

(over)

CONCLUSION.

Blind Justice implies a court blind to the identity of litigants but not shutting its eyes when confronted with a mountain of facts

If, as the lower Court held, the inquiry into the legality of a detention is to be limited to a peek at the papers, to see whether or not they are printed on the usual forms, then the procedure should be abolished to save the time of the courts and the money of credulous petitioners, for glancing at papers to see if they are in correct form is the function of a proof reader, not of a judge.

The question in this case is clear. May a man be extradited without the filing of any charge against him? The Rule in Pelley's Case, as enunciated by the lower Court, answers yes. The pathetic thing about this case is not so much the predicament of the petitioner, but of the thousands of other men, who, if the opinion is sustained by a denial of certiorari, will be the subject of persecution by any judicial tyrant whose disfavor they have incurred.

The proceedings of record constitute a monstrous infringement of petitioner's civil liberties under the Fifth, Eighth and Fourteenth Amendments to the Constitution. The record clearly shows, and it is conceded by respondent, that petitioner was given the alternative of either one to two years at hard labor OR paying into the Court One Thousand ($1,000) dollars fine plus Seven Hundred Sixteen ($716.00) dollars cost of Court. Petitioner chose to suffer the monetary penalty (F. F. 208), and paid Seventeen Hundred Sixteen ($1716.00) dollars into the coffers of the Court. This Honorable Court stated in the outstanding case Ex Parte Lange (18 Wall. 163),

> "We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, **THE POWER OF THE COURT TO PUNISH FURTHER WAS GONE.**"

The prime question in extradition is the jurisdiction of the demanding state Court over the alleged fugitive. If the "power of the Court to punish further" is exhausted by the payment of an alternative fine (as in this case) then, obviously, the Governor and the lower Court reviewing his decision had no right to order petitioner's extradition. The opinion of the lower Court holds, in substance that, had petitioner chosen to suffer one to two years at hard labor in the penitentiary, rather than pay the fine, he would be still subject to be extradited for a second punishment under the same indictment. Of course that is absurd for petitioner **CANNOT** be punished a second time under the indictment which accompanies the extradition papers in this case. The lower Court held petitioner to be still subject to the jurisdiction of the North Carolina Court, disregarding that it is conceded in this case and shown by the Findings of Fact (R. 208) that petitioner has already suffered, in full, one of the **ALTERNATIVE** punishments imposed upon him. Considered in their entirety the Findings of Fact by the District Court, binding upon both parties hereto and upon the appellate tribunals, show clearly and unequivocally that the conclusions that appellant is a fugitive and substantially charged with crime in North Carolina are without a scintilla of justification or foundation.

The lower Court held that it could not even consider the malodorous conduct of the Buncombe County Prosecutor, now on the bench in North Carolina, in having himself transferred by executive order, without any legal reason being offered for such transfer (R. 15), from the judicial district to which he had been lawfully assigned, back into Buncombe County for the sole purpose of gratifying his own personal dislike for petitioner by resurrecting petitioner's case from the file of closed cases in that courthouse and then, insolently ignoring petitioner's trial judge, who is still on the bench, and without the courtesy of conferring with the prosecutor or anyone else (R. 229), issuing an order for petitioner's arrest in contemptuous disregard of

the Law and decisions of the Supreme Court of North Carolina specifically forbidding such action. This former prosecutor, now wielding his tyrannical power on the bench as a judicial bludgeon, has revealed himself to be devoid of conscience and principle and a disgrace to the bench which he adorns by violating the time-honored and sacred rule that no judge shall inject himself into a case which he has previously prosecuted. Such unconscionable conduct on his part will be viewed with horror by all honest members of the judiciary. The proceedings of record in this case are such as to cause all just men to become horrified at the misuse and abuse of a judicial office for the purpose of gratifying a lustful desire to persecute petitioner.

The record clearly shows, without question, that the extra-legal activities of this former prosecutor are lacking in every elementary principle of justice and constitute an attempt to punish petitioner through a barefaced proceeding which makes no attempt to masquerade as legal.

This judicial tyrant indicated that he felt himself to be beyond the control of any other human agency which might restrain his abuse of the powers of his office when, in response to a question as to what justification he had for the issuance of an order for petitioner's arrest, he answered (R. 232),

> "that rests in the bosom of the Court, brother; and you and no other power that I know of can make me divulge that information, unless I wanted to, but I have no disposition to hide anything that I know of in the matter."

The decision of the lower Court that it could not consider such matters is in direct conflict with the rule laid down by this Court in the case of Johnson v. Zerbst (supra), and Walker v. Johnson (supra), clearly holding that it is the duty of the District Court on Habeas Corpus to go outside the record, if necessary, to inquire into the reason for the petitioner's detention to the end that substantial justice be done. Yet the District Court ruled (and the appellate tribunal sustained) that on Habeas Corpus reviewing a

Governor's order for extradition the hands of the Court are tied, the scope of its inquiry is narrow and (as the opinion stated) "This conduct of the North Carolina Judge, reprehensible as it may be if true, is nevertheless not subject in this proceeding to inquiry or comment by us." If that is the law then Habeas Corpus, pictured as the protection of every American from illegal imprisonment, is a farce and a nullity.

Having found as a fact that petitioner's arrest was ordered without any justification apparent of record, the opinion of the lower Court held him to be a fugitive. Although the Court found as a fact that petitioner was not charged with any misbehavior it concluded as a matter of law that petitioner is a Fugitive from Justice under a Substantial Charge of Crime. It may thus be seen that the conclusion of law is not only without foundation, but in direct contradiction of the Findings of Fact.

Respondent will urge upon this Honorable Court that, even though petitioner has paid the penalty on one of the two counts on which he was convicted, he is still subject to the jurisdiction of the trial court for punishment on the second count, on which "prayer for judgment was continued for five years." This argument on the part of respondent will shock the Court because of its flagrant disregard of settled principles of law.

> "A second judgment on the same verdict is void for want of power and affords no authority to hold appellant a prisoner." Ex Parte Lange, 18 Wall. 163.

> "The district court, after judgment rendered in first count of information, has no power to render a second judgment at a later term against the accused under the second count of the indictment notwithstanding that a continuance was had to a later date with a view of considering action to be taken on second count." Gillespie v. Walker, 296 F. 330 (W. Va. 1924).

The Supreme Court of the demanding state has also ruled upon the question and its ruling is in strict conformity with decisions of this Court that North Carolina Courts are wholly lacking in jurisdiction to punish petitioner again after he has already complied with the alternative sentence imposed upon him.

> "It is familiar learning that a court may suspend the judgment of a criminal in toto until another term, but has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count after a subsequent term, or by imposing a fine and at a later term superadding an imprisonment."
>
> Citing State v. Ray, 50 Iowa 520; State v. Miller, 6 Baxter, Tenn. 513; State v. Watson, 8 S. W. 383, 95 Missouri 411; People v. Felix, 45 Cow. 163; Thurman v. State, 54 Ark. 120; Wharton's Criminal Pleadings and Practice, Sec. 913; Whitney v. State, 6 Penn. 247. **STATE v. CROOK**, 115 N. C. 760, 20 S. E. 513.

> "That there could be only one judgment upon the indictment, and that consequently a judgment and sentence upon one count definitely and conclusively disposed of the whole indictment, and operated as an acquittal upon, or discontinuance of the other count. And the same view has been affirmed by decisions in other states." Guenther v. People, 24 N. Y. 100; Girtz v. Commonwealth, 22 Penn. St., 351; Weinzorpflin v. State, 7 Black 186; Stoltz v. People, 4 Scam. 168; State v. Hill, 30 Wis. 416; Kirk v. Commonwealth, 9 Leigh 627; Nabors v. State, 6 Ala. 700; Morris v. State, 8 Sm. and Marsh 762.

The Court below shut its eyes to the fact that petitioner's former prosecutor, now judge, violated the law of North Carolina in illegally attempting to **EXTEND THE TIME OF CONTINUED PRAYER FOR JUDGMENT LONGER THAN FIVE YEARS**. Every offer of proof going to show

the unconscionable and outrageous procedure, which is the sole basis for the charge that petitioner was a fugitive, was rejected. Every citation by petitioner of applicable decisions of this Court and the Supreme Court of North Carolina, clearly showing a lack of jurisdiction to further punish petitioner, were rejected by the lower Court. Each and every case cited in the opinion of the lower Court and in the briefs of respondent is wholly foreign and inapplicable to this case, for each and every one refers to a case in which there was **A CHARGE OF SOME KIND** against the alleged fugitive.

Not one case cited in the opinion of the lower Court, and not one case which will be cited by respondent in answer to this petition, concerns such circumstances as this case, wherein petitioner's extradition is sought **WITHOUT ANY CHARGE OF ANY VIOLATION OF ANY KIND.**

It is conceded by petitioner that had he never been punished by the Count of Buncombe County, North Carolina, there might be some merit to some of the citations offered by respondent. But, having fully complied with the judgment imposed upon him the North Carolina Court is without power to punish him again on the same indictment and lacking the power to punish, petitioner cannot be a fugitive from that Court or State.

The action of petitioner's former prosecutor, now judge, in attempting to extend the period of "continued prayer for judgment", in direct violation of North Carolina, is admitted by respondent to be a nullity. It is obvious that the order for petitioner's arrest, issued without justification, likewise fails to extend the five year "continued prayer for judgment." Even were that not true, no power exists to punish petitioner further under the continued prayer for judgment on the second count for, as shown by the foregoing citations, having been punished on one count petitioner is no longer subject to be punished on another count on the same indictment.

The proceedings in the lower Court and in the District Court restricting the scope of Habeas Corpus inquiry and

the blind disregard of the illegal and extra-judicial acts upon which petitioner's extradition is demanded require that, in simple justice, those proceedings be reversed. There was manifest error in the District Court's arbitrary refusal to admit and consider the proffered testimony of petitioner, clearly indicating a lack of good faith and substance in the extradition proceedings, as well as the rejecton of the decisions of this Court and of Supreme Court of North Carolina, clearly indicating a lack of jurisdiction over the person of petitioner effectively show that there is no legal foundation for the extradition of petitioner.

Considered in their entirety, the conclusions of the Court below that petitioner is a fugitive substantially and presently charged with crime in North Carolina, are without any basis in fact as shown by the Findings of Fact.

For this Court to say, by a denial of this petition, that the lower Court was correct in its opinion is to hold, in effect;

1. That a suspended sentence is like Damocles' Sword hanging by a hair over the head of a man, liable to fall at any moment, regardless of his good behavior.

2. That there is placed in the hands of a judge the power of a despot to imprison or not to imprison at his own whim or caprice, regardless of the law.

3. That an order for arrest issued without rhyme or reason, without any affidavit or request that it issue, is of such all powerful force that the Court on Habeas Corpus must stand aside helpless and impotent to intervene.

4. That the issuance of a capias by a District Attorney, who becomes judge, in a case prosecuted by him, sets at naught all the judicial machinery of the asylum state.

5. That the supposed protection of the God-given privilege of Habeas Corpus is a nullity and a farce when a capias, without any affidavit to support it, is issued for the arrest of a man in another state.

6. That the rules of evidence and of law confine, restrict, limit and bind the scope of Habeas Corpus inquiry so that

the purpose for which it was born is defeated and this supposed protection to the dearest of all man's possessions is, in fact, no protection whatsoever.

7. That an order for arrest of a man in the state of Ohio, issued without justification by a judge in North Carolina, magically, majestically and automatically constitutes that man a fugitive from justice.

8. That because of the limitations upon the scope of judicial inquiry on Habeas Corpus, the illegality of an order of arrest, abuse of judicial powers, lack of jurisdiction, LACK OF ANY CHARGE WHATSOEVER, regardless of merit, can only be presented to the court of the demanding state.

Let it not be said that every man in the United States who has ben tried and punished under an indictment shall live the rest of his life in fear that his former prosecutor may ascend to the bench and resurrect his case from the files and order his arrest for, according to the opinion of the lower Court in this case, though forty years have passed, though he be in the State of Washington or Alaska, he may not offer proof of lack of good faith, lack of jurisdiction in the court of the demanding state because of compliance with the sentence imposed upon him, or even that he was acquitted for, since an indictment accompanies the extradition papers, regardless of the fact that he has already been tried on that indictment, acquitted or punished, he must return to the demanding state, for "those are matters to be presented to the courts of the demanding state," said the lower Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue herein and, upon final hearing, the referred to decision of the United States Court of Appeals for the District of Columbia may be reversed and the cause remanded with appropriate instructions.

Respectfully submitted,

T. Edward O'Connell,
Attorney for William Dudley Pelley,
Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 150

WILLIAM D. PELLEY, PETITIONER

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 325–330) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 14, 1941 (R. 330–331). Motion for rehearing was denied May 6, 1941 (R. 337). The petition for a writ of certiorari was filed June 9, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner is under extradition order, issued in proper form, returning him to North Carolina for further proceedings in connection with a prior conviction. The single question is whether he is "charged with crime" in that State.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, Clause 2 of the Constitution provides:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Section 5278 of the Revised Statutes (U. S. C., Title 18, Section 662) provides:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor

> or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. * * *

The Act of March 3, 1901, C. 854, 31 Stat. 1189, 1340, Sec. 930 (D. C. Code (1929), Title 6, Section 377) provides:

> In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the chief justice of the supreme court of the District of Columbia [now the District Court of the United States for the District of Columbia, 49 Stat. 1921] shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of sections fifty-two hundred and seventy-eight and fifty-two hundred and seventy-nine, title sixty-six, of the Revised Statutes of the United States, * * * and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.

STATEMENT

Petitioner was indicted and convicted in 1935 in the Superior Court of Buncombe County, North Carolina, on the first two counts of a sixteen count indictment. The first count charged petitioner with the crime of selling securities, and causing them to be sold, without registering as a dealer or salesman as required by law; the second count charged him with making false representations for the purpose of selling securities and stocks (R. 8, 208). On February 18, 1935, a sentence of imprisonment of from one to two years was imposed under Count One and suspended for five years upon the following three conditions: (1) that he pay a fine of $1,000 and costs; (2) that he "be and remain continuously of good behavior;" and (3) that he refrain from publishing or distributing certain designated periodicals concerning the sale of securities. Prayer for judgment on Count Two was continued for five years (R. 13–15, 208).

Capias for petitioner's arrest was issued October 19, 1939, to bring him before the court for a hearing on the execution and imposition of sentence upon his 1935 conviction (R. 17–18). Petitioner was at that time, and has been since, outside the State of North Carolina (R. 208–209).

On February 23, 1940, an application for requisition was filed with the Governor of North Carolina by the prosecutor of Buncombe County, request-

ing the extradition of petitioner from the District of Columbia. Appended to the application were two certified copies of the indictment upon which petitioner was tried and convicted (R. 8, 11, 208). The application set forth the facts substantially as related above and certified that in the opinion of the applicant "the ends of justice require the arrest and return of the accused to this State for sentence and judgment upon conviction for the felony set forth in the Second Count in said Bill of Indictment, and for putting into effect the suspended sentence imposed on the First Count in said Bill of Indictment" (R. 9). The application further alleged that the applicant was advised and believed that petitioner, while in the State of North Carolina, "committed various acts and engaged in conduct and practices which constituted a violation of his parole and probation and justified the imposition of judgment," the substance of which is there set forth in detail (R. 10).

On March 8, 1940, the Governor of North Carolina forwarded to the Chief Justice of the District Court of the United States for the District of Columbia requisition papers, properly authenticated, which included the *capias,* certified copies of the indictment upon which petitioner was tried and convicted, and the above-described application (R. 12).

The Chief Justice, after a hearing on this requisition, found the petitioner to be substantially

charged with crime in the State of North Carolina and to be a fugitive from its justice. An order was issued surrendering him to the agent of that State (R. 22–24).

Petitioner thereupon filed a petition for a writ of habeas corpus in the District Court, seeking his release from custody (R. 1–6). Upon issuance of the writ (R. 7) and after hearing thereon (R. 41–185), the District Court dismissed the writ of habeas corpus and remanded petitioner to the custody of respondent for return to the State of North Carolina (R. 186). Motion for rehearing was denied (R. 187). Upon appeal to the United States Court of Appeals for the District of Columbia, that court affirmed the action of the trial court (R. 325–330).

ARGUMENT

The petitioner's contentions revolve around the proposition that on March 12, 1940, the date on which the order of extradition was issued (R. 22, 23), he was no longer "charged with crime" in North Carolina.

First. The crime with which the petitioner was charged at the time of the extradition order was the offense against the North Carolina securities laws for which he had been convicted in 1935. For purposes of the applicable Constitutional[1] and statutory[2] provisions, one who has been found

[1] U. S. Constitution, Article IV, Section 2.
[2] U. S. C., Title 18, Section 662.

guilty does not cease to be "charged with crime" until the judgment of conviction has been satisfied.[3] *Hughes* v. *Pflanz,* 138 Fed. 980 (C. C. A. 6th); *Reed* v. *Colpoys,* 99 F. (2d) 396 (App. D. C.), certiorari denied, 305 U. S. 598; *Drinkall* v. *Spiegal,* 68 Conn. 441; *Cappola* v. *Platt,* 123 Conn. 38, certiorari denied, 302 U. S. 726; *Ex parte Nabors,* 33 N. M. 324. Clearly, therefore, this petitioner would continue to be "charged with crime" until the obligations imposed upon him by the 1935 judgment of the Superior Court of Buncombe County were satisfied.

The petitioner argues, however, that these obligations had been discharged long before the order of

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[3] In *Hughes* v. *Pflanz*, the Circuit Court of Appeals observed: "The term 'charged with crime,' as used in the Constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice." (138 Fed. at 983.)

extradition was entered. He makes the alternative contentions (a) that the date of expiration of the "charge" was the date in 1935 on which he paid the fine and costs under the sentence imposed on the first count (Pet. 22–27), or (b) that the date of expiration was February 18, 1940, the end of the five year period during which execution of the prison sentence on the first count and the imposition of sentence on the second count were suspended. (Pet. 32–35.)

(a) It is perfectly apparent from the papers which the District Court had before it that the petitioner had not satisfied the entire judgment against him by the payment of the fine and costs imposed on the first count.

In the first place, the suspension of the sentence of imprisonment on this count was expressly subject to three conditions: that the petitioner pay a fine of $1,000 and the costs of the prosecution; that he remain continuously of good behavior; and that he refrain from publishing or distributing in North Carolina certain literature concerning the sale of securities. The petitioner makes no effort to explain how the latter two conditions were fulfilled by the payment of the fine and costs. By their very nature they could not be discharged until the expiration of the five-year period.

Moreover, with the petitioner's consent, the prayer for judgment on the second count was con-

tinued for five years. As the Court of Appeals observed (R. 327), this practice of postponing the imposition of sentence is one of long standing in North Carolina, and enjoys both common law and statutory sanction.[4] It is substantially equivalent to the more conventional forms of probation. This continuation of the prayer for judgment on the second count, without more, would have been sufficient to establish the jurisdiction of the Superior Court over the petitioner for the entire five-year period. The petitioner, however, appears to insist (Pet. 22–27) that the order suspending the imposition of sentence on the second count was void from its inception because it envisaged the possibility of sentencing him on different counts of the same indictment at different times. It is a sufficient answer that petitioner waived his objection by his original consent to the order in 1935, and that the question whether, under the decisions and statutes of North Carolina, sentence may be imposed and its execution suspended on one count while imposition of sentence is continued on another, is a question for the courts of North Carolina and not for the District Court of the District of Columbia in habeas corpus proceedings.[5] *State ex rel. Lea* v.

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[4] See *State* v. *Ray*, 212 N. C. 748. North Carolina Code (Michie 1939) § 4665 (1).

[5] It should be noted that both before and after the enactment of the Federal Probation Act of 1925 (U. S. C., Title 18, Sections 724–728), the practice of imposing and execut-

Brown, 166 Tenn. 669, certiorari denied, 292 U. S. 638.

(b) It is true that in normal course the charge against the petitioner would have expired on February 18, 1940, five years from the date of sentencing and several weeks before the issuance of the order of extradition. On October 19, 1939, however, a *capias* issued from the Superior Court of Buncombe County for his arrest (R. 17). At that time more than four months of the period of probation remained. The extradition papers showed that a diligent search for him was conducted in North Carolina and many other states (R. 18, 19). The application to the Governor of North Carolina by the prosecutor of Buncombe County (R. 8), and the Governor's requisition for extradition (R. 12) represented the final steps necessary to the enforcement of the *capias.* It may hardly be asserted that a probationer can escape the valid process of a court simply because a diligent search for him has failed to result in his apprehension before the expiration of the probationary period. See *Anderson* v. *Corall,* 263 U. S. 193; *Stockton* v.

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ing sentence on one count of an indictment while postponing the imposition of sentence on another count has been approved. *United States* v. *Blaisdell,* 24 Fed. Cas. No. 14,608 (S. D. N. Y. 1869); *Kreuzer* v. *United States,* 254 Fed. 34, 39, (C. C. A. 8th, 1918); *Reeves* v. *United States,* 35 F. (2d) 323 (C. C. A. 8th, 1929); *Cooper* v. *United States,* 91 F. (2d) 195, 199 (C. C. A. 5th, 1937). Cf. *Scalia* v. *United States,* 62 F. (2d) 220 (C. C. A. 1st, 1932). But cf. *Gillespie* v. *Walker,* 296 Fed. 330 (C. C. A. 4th, 1924).

Massey, 34 F. (2d) 96 (C. C. A. 4th); *Platek* v. *Aderhold,* 73 F. (2d) 173 (C. C. A. 5th); *People ex rel Patterson* v. *Bockel,* 270 N. Y. 76.

We do not understand the petitioner to make such an assertion. Instead, he appears to insist that the *capias* was not valid process, that it was a nullity, and that thus it did not interrupt the period of probation which consequently came to an end on February 18, 1940. We think that the technical sufficiency of the *capias,* like that of an indictment, is not open to question in habeas corpus proceedings to contest an order of extradition. *Munsey* v. *Clough,* 196 U. S. 364, 373; *Drew* v. *Thaw,* 235 U. S. 432, 439. But the bulk of the petition is devoted to an attack upon this *capias* and the judge who issued it. Petitioner evidently concedes, and the opinion of the Court of Appeals makes clear (R. 327–328), that the North Carolina court had the power to issue a *capias.*[6] But he charges, first, that the judge was moved solely by malice, and, second, that the *capias* was supported by no allegation on the part of the prosecutor or the probation authorities or the judge himself that the petitioner

[6] Section 4665 (4) of the North Carolina Code provides: "* * * At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence * * *. Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence."

had violated the terms of his probation or misbehaved in any way.

The first objection hardly merits a reply,[7] since it has been specifically held by this Court that the motives of the officials of the demanding state are not reviewable in a habeas corpus proceeding to test the validity of extradition. *Drew* v. *Thaw*, 235 U. S. 432, 439. See *Pettibone* v. *Nichols*, 203 U. S. 192, 203, 217; *United States* v. *Superintendent of County Prisons*, 111 F. (2d) 409 (C. C. A. 3d).

Petitioner has produced nothing to support his second objection. Nothing in the applicable North Carolina statute [8] requires that as a condition precedent to the issuance of *capias* for a probationer, a charge of misbehavior must be filed by the prosecutor or by the probation authorities or that the judge must accompany the *capias* with his own assertion that there has been a violation of the terms of probation. Nor has he pointed to a decision by any court that such a requirement exists. On the contrary, this Court has held that Section 2 of the Fed-

[7] However, the record does not support the charge (Pet. 13) that the judge who issued the *capias* had had himself transferred from his usual circuit to the circuit embracing Buncombe County for the purpose of persecuting the petitioner. It reveals, instead, that the judge in question and another agreed, for reasons not stated, to exchange circuits for the entire fall term of 1939 and that the Governor officially approved the exchange (R. 15–16). Moreover, the record shows that the judge who is to conduct the hearing in the Superior Court of Buncombe County to determine whether sentence shall be imposed and executed will not be the judge who issued the *capias* (R. 222, 226).

[8] See note 6, *supra*.

eral Probation Act of 1925 (U. S. C., Title 18, Section 725), which is strikingly similar to the North Carolina statute, vests the federal courts with power to arrest in such a case without the formulation of charges or notice of charges, there being no "limiting requirements" in that respect contained in the Act. *Burns* v. *United States,* 287 U. S. 216, 221. See *Moss* v. *United States,* 72 F. (2d) 30, 32 (C. C. A. 4th). No reason has been advanced for a different rule here.

We urge, therefore, that the *capias* of October 19, 1939, was validly issued within the term of petitioner's probation and that it must be regarded as having stayed the running of the five-year period until he had been apprehended. See *Anderson* v. *Corall, supra; Stockton* v. *Massey, supra; Platek* v. *Aderhold,* 73 F. (2d) 173, at 175; *Hinson* v. *Rochelle,* 156 N. C. 250. As a result, the petitioner continued to be "charged with crime" after the five-year period expired on February 18, 1940.

Second. On the assumption, which we have shown to be incorrect, that he was no longer charged with his original offense at the time the order of extradition was entered, the petitioner goes on to demonstrate that no charge had been made that he had misbehaved or violated the conditions of his probation. We regard the contention as irrelevant and think that it stems from confusion with respect to the nature of the offense charged. The crime with which the petitioner is charged, as we had said, is the offense against the securities laws of North Caro-

lina for which he was convicted in 1935. It has nothing to do with his conduct since that time. The question whether he has behaved in a manner warranting the execution and imposition of sentence on the original offense is a question to be determined by the North Carolina court after the petitioner has been returned. It is a question which was beyond the jurisdiction both of the Chief Justice in passing upon the request for extradition, and of the District Court in the habeas corpus proceedings. *Ex parte Nabors,* 33 N. M. 324; *Cappola* v. *Platt,* 123 Conn. 38. See *State* v. *Everett,* 164 N. C. 399.

CONCLUSION

No special and important reason for the exercise of the discretionary power to review on certiorari has been shown in this case. No conflict of decisions is involved and the decision of the Court of Appeals is correct. We, therefore, respectfully submit that the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 150

WILLIAM D. PELLEY, *Petitioner,*

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA, *Respondent.*

PETITIONER'S REPLY BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY BRIEF.

I

This case is of great public importance. Countless columns have been devoted to it by the newspapers of the entire nation and it has received much attention on the nation's radio networks in individual and coast-to-coast broadcasts.

Throughout America thousands upon thousands of citizens, among them many well-known lawyers, refer to this case with the sinister remark that the petitioner "is being railroaded". Petitioner has offered to prove that this is true but has been denied that privilege in the lower courts for the unconscionable reason that "the court cannot go

outside the record on Habeas Corpus reviewing an order for extradition."

The constitutional rights of petitioner have been flagrantly violated throughout these proceedings. Applicable decisions of this court, of other courts of the United States and of the courts of the forty-eight states have been contemptuously ignored.

Habeas Corpus, the most sacred bulwark and protection of the American people against oppression, has been completely and finally emasculated.

The lower courts have made the outrageous ruling that the mere issuance of a capias by petitioner's former prosecutor, now a judge, automatically constitutes petitioner a fugitive (R. 209) while at the same time making Findings of Fact that no subsequent charge of misbehavior of any kind had been made against petitioner and that petitioner paid the full monetary penalty in lieu of serving a jail sentence. A new version of due process.

The question involved in this case is not complex, vague or difficult to understand. It is simply this. May one who has paid a fine, after having been given a choice of either paying or going to jail, be further punished under the same indictment or deprived of his liberty in connection therewith? The Constitution of the United States answers no. (Fifth Amendment.)

In forthright and ringing terms this Honorable Court answered the question in the leading case on the subject, Ex parte Lange, 18 Wall. 163. In the course of a painstaking and extensive opinion on that very question this Honorable Court said,

> "The judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end."
>
> "A second judgment on the same verdict is, under such circumstances, void for want of power, and it affords no authority to hold the party a prisoner, and he must be discharged."

It was thought by the legal profession of America that the question had been finally disposed of but the lower court did not mention and respondent ignores and evades all discussion of the most pertinent question with which we are here concerned. The Federal Courts of the United States have given effect to the above mentioned rule of law but the lower court rejected it in this case, holding that although petitioner has paid one of the alternative penalties (Findings of Fact (R. 208-9)) he is still subject to the jurisdiction of the Buncombe County Court. Obviously, if the "power of the court as to that offense is at an end" the power to extradite does not exist.

The respondent claims that the failure of the North Carolina Court to sentence petitioner on the second count justifies his return six years later for the purpose of now imposing sentence. Respondent says petitioner consented to the continued prayer for judgment on the second count so he cannot now object to being sentenced on it. Who ever heard of a defendant demanding that a court impose sentence on a count when the court has indicated a suspension of judgment on that count? Even though the court intended to impose sentence at a later date its power to do so was lost by its imposing sentence on the previous count and this rule has been adhered to by all the federal courts of the United States and by the superior courts of the forty-eight states.

> "The district court, after judgment rendered in first count of information, has no power to render a second judgment at a later term against the accused under the second count of the indictment *notwithstanding that a continuance was had to a later date with a view of considering action to be taken on second count.*"
>
> *Gillespie* v. *Walker*, 296 F. 330 (W. Va. 1924);
> *Edgerton* v. *Commonwealth*, 5 Allen 514 (1862);
> *Commonwealth* v. *Bennett*, 2 Va. Cas. 235;
> *Commonwealth* v. *Foster*, 122 Mass. Rep. (1877) 317;
> *Guenther* v. *People*, 24 N. Y. 100;
> *Girtz* v. *Commonwealth*, 22 Penn. St. 351;

Weinzorpflin v. *State*, 7 Black 186;
Stoltz v. *People*, 4 Scam. 168;
State v. *Hill*, 30 Wis. 416;
Kirk v. *Commonwealth*, 9 Leigh 627;
Nabors v. *State*, 6 Ala. 700;
Morris v. *State*, 8 Sm. and Marsh 762;
Bens v. *U. S.* 266 F. 152, (1920) 41 S. Ct. 8, 254 U. S. 634, 65 L. Ed. 449

Unless Certiorari is granted and the lower court reversed in this case the above mentioned section of the Constitution, the decisions of this Court and of all the courts throughout the United States, relating to that section of the Constitution, are to be thrown upon the junk heap, for the record clearly shows that petitioner was given the alternative of either paying a fine or going to jail. Petitioner chose the latter. The lower court evaded this question by ignoring it as it also ignored the applicable decisions of this Court relating to the question. The lower court strayed so far afield as to imply that petitioner is on probation, despite the fact that the judgment of the Buncombe County Court did not require petitioner to remain in North Carolina, to report to any agency, and went so far as to discharge petitioner's bond at the time judgment was imposed upon him. The Buncombe County Court, in its judgment, said in effect that if petitioner would behave himself he might pay a fine instead of going to jail. The Findings of Fact (R. 208-9) indicate payment of the fine, petitioner's good behavior and the lack of any charge of misbehavior, a clean cut finding of full compliance by petitioner with every requirement of judgment imposed upon him. Yet, the lower court holds petitioner to be a fugitive for the sole and simple reason that his former prosecutor, filled with revenge and now a judge, has ordered petitioner's arrest. That order is the only basis for these proceedings, yet, it was issued by a judge who was assigned by law (R. 15) to another court, who was barred by all principles of law and decency from acting in this case after having previously prosecuted it. This illegal order was issued without the knowledge of the

present prosecutor (R. 281) and without any request or affidavit of anyone (R. 208-9). In arrogant fashion the judicial tyrant who issued the order refuses to give one reason to justify the order of arrest. (R. 232)

Petitioner mentions these matters to show the illegality of the entire proceeding but respondent glibly echoes the lower court's evasion by saying "We can't inquire into motives". Justifying this statement respondent cites cases not one of which applies here. In every case mentioned by him either the alleged fugitive had never been punished after conviction or had never been tried in the demanding state. Petitioner has suffered both. Not one case can be found by the respondent, out of all the millions of cases in the law books, which holds that one who has paid a fine under an indictment may be extradited for further punishment under that same indictment. Nor will there be found one case in which extradition was even requested.

Despite the malodorous and unconscionable facts disclosed by the record in this case, wherein a judge was so lacking in conscience and principle and so overwhelmed by his own personal dislike for the petitioner as to have himself transferred out of his own judicial district (R. 15) into another judicial district so that he could there remove from the musty files a case long since closed, with the bond released and discharged, and then arbitrarily order the arrest and extradition of petitioner, whom he personally had prosecuted in this identical case, the respondent, suavely evading the real issues, sets forth excerpts from cases wholly inapplicable and has the temerity to urge upon this August and Honorable Court that such proceedings constitute Due Process of Law, and in no way infringe the Civil Liberties of the petitioner.

This horrifying picture is further aggravated by the action of the lower Court in refusing to consider anything other than that the indictment appeared valid on its face and was accompanied by the governor's certification. According to the lower court the mere fact that petitioner had previously been tried, convicted and punished on that indict-

ment was unimportant and even though he were found not guilty on the indictment such fact may not be considered for "we must confine ourselves to the extradition papers alone, All other matters must be taken up in the demanding state", all in disregard of the applicable decision of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458, which laid down the rule that ". . . it is open to the courts of the United States upon an application for a Writ of Habeas Corpus to look beyond forms and inquire into the very substance of the matter, . . .". Obviously, the lower court erred in ruling that it was without power to go behind the requisition of the Governor and that all such matters were within the Governor's discretion (R. 73) and that the court was confined to an inspection of the extradition papers (R. 74). Certainly, in such suspicious circumstances the question of good faith was interwoven with the question of whether or not extradition is sought for a bona fide purpose. The lower court was not bound to perform an idle act merely to satisfy the lust and hatred of petitioner's former prosecutor, now misusing his power as a judge.

RULES OF LAW ESTABLISHED IF CERTIORARI IS DENIED.

The lower court has made its ruling. Denial of Certiorari places the stamp of approval upon that opinion and establishes the following as the law under which one hundred and thirty-five million citizens of the United States of America must live from now on:—

1. Habeas Corpus is no protection against an outrageous abuse of judicial power in the issuance of an order of arrest without any reason whatsoever being offered to justify its issuance.

2. Although a man has been sentenced to either pay a fine or go to jail on one count of an indictment, having elected to pay the fine, that court may still punish him again on that and all of the other counts in that same indictment.

3. A court may induce a defendant to waive his right of appeal by suspending sentence on one of two counts and requiring him to pay a fine on the other count then, long after the time for taking an appeal has expired, impose another sentence at the caprice of the former prosecutor, now become judge.

4. On Habeas Corpus a court may hold a man to be a fugitive although the Findings of Fact (R. 208-9) clearly indicate the payment of a fine and no subsequent charge of misbehavior.

5. Two judgments on the same verdict at separate times may be imposed.

6. Habeas Corpus on extradition looks not to the substance of the demand but only at the face of the papers and if they appear to be in the usual or proper form, there is no alternative other than to order that the alleged fugitive be extradited though he may have already been punished or acquitted.

7. The issuance of a capias without any paper, affidavit, allegation of misbehavior, or other charge makes a man a fugitive even though the judge who issued the capias refuses to give any reason for its issuance (R. 232).

8. Any judge may indulge his hatred for a person of a different race, creed, religion or political belief by his own whim or caprice and if the object of his hatred is in another state the action of the tyrant may not be questioned and Habeas Corpus is powerless to afford relief in such circumstances.

9. One who has been tried and punished or acquitted on an indictment may not show such fact on extradition for such matters are outside the record and the court must confine itself to a scrutiny of the extradition papers containing the second-hand indictment and certification that the charge contained in it constitutes a crime.

10. For a prosecutor, who becomes a judge, thereafter to inject himself into a case previously prosecuted by him is no violation of the Due Process Clauses of the Constitution.

11. Although the law of a state forbids keeping a man under suspension of sentence in excess of five years such statute may be evaded by the mere issuance of a capias without any legal reason for its issuance.

12. Sentence on one count of an indictment does not bar subsequent sentences on each of the other counts of the indictment upon which any man has been convicted.

13. An indictment upon which a man has been tried, convicted and sentenced does not lose its efficacy by that reason and is just as sacred for purposes of extradition as though the man had never been tried or punished under it.

14. The courts of the demanding state are powerless to inquire into the injustice of a demand for the return of an alleged fugitive.

15. It is no violation of the Due Process Clause of the Constitution for a prosecutor, who afterward becomes judge, to inject himself into a case which he had previously prosecuted.

16. A suspended sentence may be revoked at any time without giving any reason for revocation.

17. On Habeas Corpus the courts of the asylum state are barred from considering the law of the demanding state in deciding the question of fugitivity.

18. No evidence may be offered by the alleged fugitive on Habeas Corpus to show that his return has been sought not for a legal reason but only to gratify the personal malice of his former prosecutor.

19. One whose extradition is sought has no right to know who pays the compensation of his prosecutors, even though

the record clearly indicates that his prosecutors are receiving compensation from private sources.

20. The governor's seal upon extradition papers is so sacred that it may not be questioned and no evidence may be offered to show that in reality the alleged fugitive is not a fugitive and that his extradition is sought for an illegal purpose.

21. Questions of lack of good faith or of jurisdiction in the courts of the demanding state may only be decided in the courts of the demanding state because the courts of the asylum state must confine their scrutiny to the extradition papers alone.

Astonishing as the foregoing may sound, each and every one is the rule laid down by the lower court and each is the law of the land if certiorari is denied.

Respectfully submitted,

T. Edward O'Connell,
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